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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOCIATION, et al.,
Petitioners,

v.

THE CITY OF MAYFIELD HEIGHTS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a municipality denies condominium homeowners equal protection under the Fourteenth Amendment where the municipality provides the tax supported benefit of waste collection and disposal for single and double family homeowners but denies this benefit to single family homeowners who own condominiums.

II. Whether a court of appeals may hypothesize or conceptualize facts to support an equal protection rational basis scrutiny of an administrative municipal policy.

III. Whether a court of appeals may, on its own initiative, deny condominium homeowners all municipal services except fire and police, including services such as provided by the health department, building department, department on aging and recreation department.

IV. Whether a court of appeals may usurp the accepted maxims of appellate court power to overturn and modify the findings of fact made by a district court judge.

PARTIES TO THE PROCEEDINGS

Petitioners

Woodhawk Club and Woodhawk II, the petitioners are nonprofit corporations with no parent companies and with no subsidiaries. The petitioners are sometimes hereinafter jointly referred to as "Woodhawk."

Respondent

The City of Mayfield Heights, Ohio, a municipal corporation is the respondent. The respondent is sometimes hereinafter referred to as the "City."

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The Woodhawk Club Condominium Owners Association and Woodhawk Club Condominium II Owners Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit on this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth District is unpublished. A copy is included in the Appendix A. The opinion of the United States Court of Appeals for the Sixth District denying the petition for rehearing en banc is unpublished. A copy is included in the Appendix C. The opinion of the United States District Court for the Northern District of Ohio is unpublished. A copy is included in the Appendix at B.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion of February 3, 2000. On February 17, 2000, Petitioner filed a petition for rehearing en banc which was denied on March 24, 2000. The petition for writ of certiorari is filed within ninety days of the denial of the petition for rehearing en banc. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution Article I § 2 provides:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

STATEMENT OF THE CASE

The respondent provides the tax supported service of garbage collection and disposal to all single and double family homeowners within its borders but denies this service to those single family homeowners who own a condominium. Woodhawk brought this action to enjoin the respondent's discriminatory action.

The district court agreed with Woodhawk and found that the respondent's "policy of refuse collection and disposal

[was] unconstitutional and null and void to the extent it denies [Woodhawk] equal protection under the law." Appendix B, pg. 25a. The respondent was "restrained and enjoined from further failing, refusing or neglecting to pick up and collect [Woodhawk's] refuse." Appendix B, pg. 25a.

At the trial, the respondent argued that there was an agreement or contract between the developer [not Woodhawk] and that the City provided for a waiver of certain building code restrictions in exchange for a waiver of refuse collection and disposal. Thus, Woodhawk was an third party beneficiary of the alleged agreement. This issue was tried, testimony was taken, documents were admitted into evidence, and oral arguments presented.

The district court found "no contractual agreement between the condominium members or the association and the City that would obligate [Woodhawk] to pay these refuse costs." Appendix B, pg. 23a. The district court found no evidence in any documents including Woodhawk's Declaration or the Planning Commission minutes to support the respondent's arguments. Appendix B, pgs. 22a-23a.

The respondent appealed to the Sixth Circuit Court of Appeals. The court of appeals overturned an express determination of fact made by the district court and reversed the district court's decision. The court of appeals based its decision upon one line of testimony from the former mayor of Mayfield Heights. He testified, "Those are the two services [i.e. police and fire] that we do give to private developments or multifamily developments." Appendix A, pg. 10a. From this testimony, the court of appeals determined that the district court's findings of fact were clearly erroneous and stated, "It is clear that if fire and police service are the only two City functions provided to Woodhawk, then all other services,

including garbage collection, are not provided." Appendix A, pg. 10a. Note that the former mayor did not state that there was an agreement between the developer and the respondent. He simply testified that this was the way they always did it.

Woodhawk filed a petition for rehearing en banc which was denied on March 24, 2000. Appendix C, pg. 27a.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance. The equal protection clause demands no less. The court of appeals decision, which overturns the district court's decision following a trial on the merits, allows municipalities to discriminate against single family homeowners who own condominiums in favor of other single family residences who do not own condominiums.

BACKGROUND

Pursuant to its administrative policy, the respondent confers the benefit of tax supported service of garbage collection and disposal to all single and double family homeowners within its borders. Condominium homeowners whose residences abut private roadways are excluded from receiving this tax supported benefit. When a municipality distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The respondent's administrative

policy should survive scrutiny only if the distinction it makes rationally furthers a legitimate municipal interest.

The respondent creates a classification between condominium homeowners and non-condominium homeowners for the purpose of distributing the tax supported service of garbage collection and disposal. This classification is not rationally related to the respondent's expressed purpose of keeping its residents safe, does not promote efficient sanitation and has no impact on the respondent's potential liability for injury or damages incurred during the performance of garbage collection.

The respondent's argument that the Woodhawk homeowners are third party beneficiaries of a contract between the respondent and the developer fails for two reasons. First, the trial court found after a trial on the merits that there is no contract from which the respondent and the developer intended the Woodhawk homeowners to benefit. Second, if such a contract existed, then the Woodhawk homeowners would be obligors (having to pay for private refuse collection where other homeowners enjoy the tax supported service of refuse collection), rather than beneficiaries. This court analyzed policies conferring benefits upon citizens in Zobel v. Williams, 457 U.S. 55; 102 S.Ct. 2309; 72 L.Ed.2d 672 (1982) and Hooper v. Bernalillo County, 472 U.S. 612; 105 S.Ct. 2862; 86 L.Ed.2d 487 (1985). Since the issue in the instant matter concerns the constitutionality of a municipality providing benefits unequally, the analyses of Zobel and Hooper control.

This Court defined the level of required scrutiny as follows:

> When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose.

Zobel, 457 U.S. at 60; Hooper at 472 U.S. at 618.

Applying this standard to the instant matter, the respondent's discriminatory policy survives Constitutional scrutiny only if this discrimination which confers benefits on one set of homeowners but denies them to other homeowners similarly situated, furthers a legitimate municipal interest.

Instead of applying Zobel and Hooper, the court of appeals perpetuated a new standard first created by the eleventh circuit in the case of Beauclerc Lakes Condominium Assoc. v. Jacksonville, 115 F.3d 934 (11th Cir. 1997). If allowed to continue, Zobel and Hooper will be replaced by a standard which authorizes a court of appeals to determine whether a conceivably rational basis exists to believe that governmental action could further a hypothesized purpose.

The court of appeals overturned the district court's finding of fact, determining that the trial court committed clear error. The court of appeals determined that the developer and the respondent entered into a contract. Even if this were true, which it is not, then by allowing the decision to stand necessarily means that a governmental entity can practice discriminatory policies if the entity and a third party agree.

The court of appeals allows municipalities across the country to discriminate against condominium homeowners by

denying them certain services they provide other non-condominium homeowners. Municipalities no longer must justify their discriminatory distinction with a legitimate state interest. Now they only need a "hypothesized" purpose.

There is no realistic prospect of the resolution of this problem without the decision of this Court.

LAW AND ARGUMENT

A. The respondent denies Woodhawk homeowners equal protection under the Fourteenth Amendment and Article 1 Section 2 of the Ohio Constitution because it provides the tax supported benefit of waste collection for single and double family homeowners but denies this benefit to single family homeowners who own condominiums.

B. The court of appeals may not hypothesize and conceptualize facts to support an equal protection rational basis scrutiny of the respondent's policy decision.

The United States Supreme Court defines the accepted maxim:

> When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the equal protection clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state interest.

Zobel v. Williams, 457 U.S. at 60 (1982); Hooper v. Bernalillo County, 472 U.S. at 618 (1985).

The court of appeals in the instant matter did not apply the standard promulgated by the United States Supreme Court. The court of appeals applied a decision from the eleventh circuit, Beauclerc Lakes Condominium Assoc. v. Jacksonville, 115 F.3d 934 (11th Cir. 1997) which is inconsistent with the Zobel and Hooper standards.

Instead of determining whether the distinction the respondent makes rationally furthers a legitimate state purpose, the court of appeals applied the eleventh circuit's test to determine whether "a rational basis exists to believe that the government action would further a hypothesized purpose. Beauclerc at 115 F.3d 935." (Emphasis added.) Appendix A, pg. 8a. This inquiry has been described as determining whether a "conceivably rationale basis exists, not whether the basis was actually considered by the legislative body." Id.

A municipality, per the court of appeals, no longer must justify its discriminatory practices by showing the distinction furthers a legitimate state interest. Now they must merely show a court of appeals that a conceivably rational basis exists to believe that the governmental action would further a hypothesized purpose.

The court of appeal's decision places its equal protection analysis of municipal administrative decision in a unique and dangerous position contrary to the United States Supreme Court mandates. It allows a circuit court of appeals to hypothesize and conceptualize, rather than determine if a district court's decision is clearly erroneous. Anderson v. City of Bessemer, 470 U.S. 564 (1985).

The court of appeal's decision is contrary to previous decisions of the Sixth Circuit. The case of Bannum, Inc. v. City of Louisville, 958 F2d 1354 (6th Cir. 1991) involved the application of the rational relationship test to an equal protection challenge of a municipal zoning ordinance. The Sixth Circuit stated that ". . . zoning decisions are reviewed to determine whether the classifications drawn by the regulations are rationally related to a legitimate interest of the state or municipality." Id. at 1360.

> If the City's goal was to protect its residents from recidivists, then some data reflecting the extent of the danger must exist in order to render the different treatment of CTCs rationally related to that goal. The rational relationship standard is not met when the classification relied upon by the legislative authority is 'so attenuated as to render the distinction arbitrary or irrational.' City of Cleburne, 473 U.S. at 446, 105 S.Ct. at 3258 (citing Zobel v. Williams, 457 U.S. 55, 61-63, 102 S.Ct. 2309, 2313-14, 72 L.Ed.2d 672 (1982); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 535, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973).

Bannum at 1360-1361.

The Sixth Circuit in Bannum did not hypothesize facts in order to create a rational basis. It relied upon the U.S. Supreme Court's mandate in Zobel, that the rational relationship standard is not met when the classification relied upon "so attenuated as to render the distinction arbitrary or irrational."

In the instant matter, if the respondent's goal was fiscal responsibility, then the distinctions between condominium homeowners and all other single-family homeowners are subject to scrutiny. These distinctions must rationally further the respondent's goal of fiscal responsibility. However, The court of appeals hypothesized a rational basis in order to take the case out of the equal protection analysis and into an estoppel argument. The court of appeals used the "could have considered" and hypothesized facts that the trier of fact specifically found did not exist.

C. The court of appeals decision requires the respondent to provide only fire and police services and denies, to condominium homeowners, all other municipal services such as those provided by the health department, the building department and department on aging.

The court of appeal's decision creates a new issue of exceptional importance. The respondent may now deny all municipal, tax supported services to condominium homeowners at Woodhawk, except fire and police. The court of appeal's decision permits a denial of other municipal services to condominium homeowners such as the services provided by the health department, the building department, the recreation department and department on aging. The impact of this decision is so overwhelming that the errors described above are compelling.

This result is the consequence of the circuit court hypothesizing facts. The circuit court does not have the luxury of hearing all the testimony, reviewing all the documents, and observing the credibility of witnesses.

If discriminatory practice is legitimized by historical usage, then there could be no prohibition of discrimination. The court of appeals elevates the respondent's argument, "we *always did it this way" to levels of acceptance* never before recognized by the courts of this land. This country would still be mired in discriminatory practices long ago decried as violative of the Unites States Constitution.

D. The court of appeals decision is contrary to accepted standards of appellate review and usurps the accepted maxims of appellate court power to overturn and modify the findings of fact made by a district court judge.

The United States Supreme Court states:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

Anderson at 470 U.S. 573.

> If the District Court's account of the evidence is plausible in light of the record viewed in its entirely, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there

> are two permissible views of the evidence the fact finder's choice between them cannot be clearly erroneous.

Id. 573-574.

The court of appeal's decision found that the district court's finding of fact that the agreement did not include garbage services was clearly erroneous. Appendix A, pg. 9a. The court of appeals bases this upon two factors. The first factor is the testimony of former Mayor DeJohn, that fire and police services are two services that are given to private developments or multi-family developments. Secondly, the court of appeals overturned the district court's finding of fact based upon a notification of homeowners that the garbage removal will be a common area expense as set forth in the required disclosure statements.

The court of appeals ignores the other testimony and evidence, and substitutes its preferred decision for the district court's finding of fact.

The court of appeals uses both of these reasons to find the district court's decision was clearly erroneous in order to determine the respondent's "conceivably rationale basis" for meeting its cost containment goal.

The Supreme Court further states:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and

> with experience in fulfilling that role comes expertise.

Id. at 574.

When findings are based on determinations regarding the credibility of witnesses:

> Rule 52(a) demands even greater deference to the trial court's findings for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Id. at 574-575.

The court of appeals did not explain how a developer can bind a condominium association to an implied contract, even if one did exist. However, the district court reviewed and rejected the various theories advanced by the respondent. Appendix B, pgs. 22a-23a.) Woodhawk is not a third party beneficiary. There is no language in the declaration sufficient to create an obligation. It does disclose that collection and disposal of garbage is a cost the Woodhawk members must bear, but disclosure of an unlawful act cannot make it otherwise lawful.

The court of appeal's decision supports the theory that unlawful conduct is made lawful by mere publication. The developer had to disclose the garbage refuse as a line item in a proposed budget because the respondent would not pick up the garbage. This does not condone the respondent's actions, nor is evidence of an agreement.

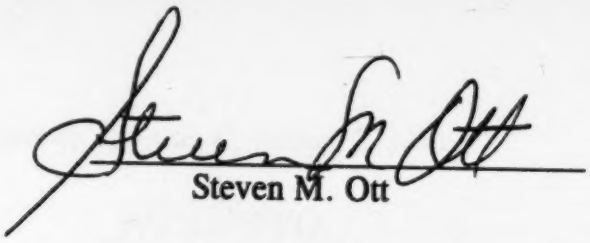
The court of appeals took two lines from the entire trial and determined that the district court's specific finding of fact based upon the entire transcript, was clearly erroneous.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. Otherwise, the Supreme Court's teachings of Zobel v. Williams, 457 U.S. 55 (1982) and Hooper v. Bernalillo County, 472 U.S. 612 (1985) will be undercut, lower courts will be permitted to hypothesize facts to create a rational basis for equal protection acceptance and the court of appeals will usurp accepted maxims of appellate power to overturn and modify findings of fact made by the district court. The net effect will be the continued discriminatory conduct directed toward condominium homeowners.

The court of appeal's decision is inconsistent with established United Supreme Court decisions and creates dangerous precedent. The court of appeals decision changes the equal protection analysis mandated by Zobel and Hooper. The consequence results from the court of appeals failing to apply the appropriate review of determination of fact, as set forth in Anderson v. City of Bessemer, 470 U.S. 564 (1985). Supreme Court guidance is needed.

Respondent respectfully requests that this Court grant this Petition for a Writ of Certiorari so that arguments may be fully presented to put a stop to the discrimination practiced by the respondent and prohibit any court of appeals from hypothesizing facts to support a rational basis inquiry.



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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed February 3, 2000]

No. 98-4163

THE CITY OF MAYFIELD HEIGHTS, ET AL., *Defendants-Appellants*	)
v.	)
THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOC., ET AL., *Plaintiffs-Appellees.*	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AT AKRON

OPINION

BEFORE: NELSON and DAUGHTREY, Circuit Judges; and BERTELSMAN, District Judge.*

PER CURIAM. Defendant-Appellant City of Mayfield Heights appeals a decision in which the district court determined that the City's failure to collect garbage from the Woodhawk Condominium complex did not amount to a policy that was rationally related to a legitimate government interest. For the reasons stated below, we REVERSE.

FACTUAL BACKGROUND

The City of Mayfield Heights is a municipal corporation organized and existing under the laws of the State of Ohio. The City is an eastern suburb of Cleveland with approximately twenty thousand residents. The City's housing stock comprises approximately five thousand single-family homes with a few two-family residences. The remaining five thousand dwellings consist of multi-family condominium developments and apartments.

Margaret A. Egensperger is the duly elected Mayor and Safety Director of the City, who controls and supervises all departments and divisions of the City's administration. Andrew Fornaro is the Service Director for the City who, before the privatization of garbage collection and removal, was responsible for directing the collection and removal of

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* The Honorable William O. Bertelsman, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

garbage for the City. Ross C. DeJohn is the former Mayor and Safety Director of the City who served as such from 1966 to 1994.

Appellees Woodhawk Club and Woodhawk II are not-for-profit Ohio corporations. Woodhawk Club provides a corporate entity owned by two hundred thirty-six condominium unit owners. Woodhawk II provides the same structure for seventy-two condominium unit owners. Woodhawk Club and Woodhawk II are located in the City of Mayfield Heights, Ohio. For the sake of convenience, the two organizations will be referred to collectively as "Woodhawk." The Woodhawk development can be fairly characterized as an upscale community comprised primarily of "empty nesters." The streets in Woodhawk are concrete, but their rights-of-way are narrower than that of the typical City street. Woodhawk's streets were never dedicated to public use. Sidewalks are lacking on some of the Woodhawk streets, and, where sidewalks are present, there are no tree lawns (grassy strips) between the walkway and the roadway.

In the 1960's the City, through Mayor DeJohn, adopted an administrative policy to provide for the collection and disposal of garbage from all single and duplex residences. This service is supported by public taxes. At or about the same time, the City adopted a policy denying garbage collection to condominium developments that did not directly abut publicly dedicated roadways within the City.

Woodhawk's developer, Zaremba Woodhawk Company, approached the City for approval of the complex in 1980. The City's initial consideration was whether or not to grant a request for a zoning variance for the property from

a Single-Family Residence Classification to Multi-Family Development Classification. Zaremba ultimately received a zoning variance.

The developer next requested an exemption from the City's Building Code Standards regarding building setbacks from roadways, exclusion of sidewalks and tree lawns, and reduction of right-of-way width requirements. In the Planning and Zoning Commission Minutes of March 3, 1980, the City agreed to the exemptions in exchange for assurances by Zaremba that Woodhawk would be a "private, gated community without the need for City maintenance services."

Ohio Revised Code § 5311.26 requires that condominium developers provide a disclosure statement to prospective owners which details all material circumstances or features affecting the purchase of such a unit. In that disclosure under § I(3) "Other Contracts that Affect the Condominium Development," Zaremba disclosed that: "as the units and other improvements near completion, the developer will be entering into other contracts on behalf of the condominium development such as contracts for snow removal, landscaping, garbage removal, exterminating, etc., the same will be set forth on Exhibit 'E' of this disclosure statement." (Disclosure Statement for the Woodhawk Club Condominium, Joint Apdx. p. 353, 369).

Schedule "B" of the same document summarizes annual and monthly costs of garbage removal for the first two years of the development. (Annual and Monthly Expenditures by Category for Common Area Expenses, Joint Apdx. p. 379). Under "budget assumptions" in Schedule "B," the disclosure indicates that garbage removal costs are based on

an estimate from Browning-Ferris Industries, a private garbage hauler. Id. p. 381.

In addition, Mayfield Heights's Ordinance § 1357.05 requires that this same disclosure be filed with the City before its use for any promotional purposes. (City of Mayfield Heights Building and Housing Code, § 1357.05 Public Offering Statement, Joint Apdx. p. 590). All indications from the record are that Zaremba filed this disclosure as required.

Through the above requirements, prospective unit owners at Woodhawk are advised of all maintenance costs, including garbage collection and removal, before purchasing a Woodhawk condominium. The unit owners' knowledge of their expenses is also disclosed to them through recorded filings of the Declaration of Condominium Property and deed covenants and restrictions. These documents show that garbage removal is part of the unit owners' financial responsibility.

In 1989, Wesley G. Schmidt, a unit owner in Woodhawk, demanded that the City collect Woodhawk's garbage. Indeed, Schmidt threatened the City with litigation if this demand was not promptly met. Additional requests were made by Schmidt and others for the City to begin providing garbage collection service. The City consistently denied all requests to commence garbage collection at Woodhawk.

Woodhawk finally filed suit in the United States District Court for the Northern District of Ohio at Akron on July 1, 1997. Mediation was scheduled for July 21, 1998. The case was returned to the district court for further

processing on July 28, 1998. A bench trial was held on August 11, 1998. Proposed Findings of Fact and Conclusions of Law issued on August 17, 1998. Final Judgment for Woodhawk was entered August 26, 1998.

The court found that the City's garbage collection policy was unconstitutional under the Equal Protection Clause of the Constitution of the United States as incorporated by the 14th Amendment.

The City, its mayor, and other officers were restrained and enjoined from refusing to collect garbage from Woodhawk. The City was ordered to commence garbage collection within three months from date of entry of Judgment. Finally, Woodhawk was awarded $26,000 in damages as a result of the City's unconstitutional actions. This timely appeal followed on September 22, 1998.

JURISDICTION OF THE COURT

District court jurisdiction was proper as the constitutional issue in this case raised a federal question. 28 U.S.C. § 1331. Appellate jurisdiction is based upon 28 U.S.C. § 1291.

STANDARD OF REVIEW

In a bench trial, the district court's conclusions of law are reviewed de novo. Kline v. Tennessee Valley Authority, 128 F.3d 337, 341 (6th Cir. 1996). This court reviews a district court's findings of fact under the clearly erroneous standard of review. Id. A finding of fact will only be clearly erroneous when, although there may be some evidence to

support the finding, the "reviewing court is left with the definite and firm conviction that a mistake has been committed." Id.

THE MERITS

I. THE GARBAGE COLLECTION POLICY SHOULD BE ANALYZED USING RATIONAL-BASIS REVIEW.

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." Cutshall v. Sundquist, 193 F.3d 466, 482 (6th Cir. 1999) (internal citations omitted).

> The general rule in equal protection analysis is that state action is presumed to be valid and will be sustained if the classification drawn by the state is rationally related to a legitimate state interest (citation omitted). [W]here a state classifies by race, alienage, or national origin, or where a state impinges on personal rights protected by the Constitution; such action is subjected to strict scrutiny and will be sustained only if narrowly tailored to serve a compelling state interest.

Valot v. Southeast Local School District Board of Education, 107 F.3d 1220, 1229 (6th Cir. 1997). Woodhawk has stipulated that garbage collection and removal is not a suspect classification under Equal Protection Clause jurisprudence. The distinction drawn by the City in this case centers on ownership of a certain type of residence, "which is not among

the 'suspect classifications' recognized by the courts." Beauclerc Lakes Condominium Assoc. v. City of Jacksonville, 115 F.3d 934, 935 (11th Cir. 1997).

Woodhawk has also stipulated that no fundamental right is involved in this dispute. That stipulation was correct; the right to free waste collection is not a fundamental fight. Id.; See Goldstein v. City of Chicago, 504 F.2d 989, 991-92 (7th Cir. 1974) (denying claimed violation of Equal Protection Clause by condominium owners based on provision of free garbage collection to single-family residences). Therefore, rational-basis review applies in this case.

Rational-basis review requires a two-step process. First, one must identify "a legitimate government interest the enacting government body could have been pursuing." Beauclerc, 115 F.3d at 935. Second, one must determine whether a "rational basis exists to believe that the legislation would further the hypothesized purpose." Id. Each requirement will be analyzed in turn.

A. The City's goal of controlling the costs associated with garbage collection is a legitimate government interest.

The legitimate government interest of the City was the promotion of efficiency in the collection of garbage in order to preserve scarce municipal resources. This Circuit has held that the "valid interest in conserving public and private financial resources is, standing alone, of sufficient weight to justify the City's Charter Amendment under a rational basis analysis. . . ." Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 301 (6th Cir.), cert.

denied, __ U.S. __, 119 S. Ct. 365, 142 L.Ed.2d 302 (1998). See also Edwards v. Valdez, 789 F.2d 1477 (10th Cir. 1986) (holding that ease of administration and preservation of the fiscal integrity of an unemployment program are legitimate government concerns).

Against this backdrop, control of the costs in the City's sanitation department amounts to a legitimate government objective. As to step one, then, the City has articulated a legitimate government interest.

B. The agreement between Zaremba and the City was a rational basis for meeting the government interest of containing garbage collection costs.

The second step in the rational-basis inquiry is to determine whether a rational basis exists to believe that the government action would further the hypothesized purpose. Beauclerc, 115 F.3d at 935. This inquiry has been described as determining whether a "conceivably rational-basis exists, not whether that basis was actually considered by the legislative body." Id.

Turning to our case, the City's conceivably rational basis for meeting its cost containment goal arose from its negotiations with Zaremba prior to approval of the development. In those discussions the City agreed to waive, *inter alia,* building setback requirements in exchange for Woodhawk's disclaiming any City maintenance services. The district court found as a fact that this agreement did not include garbage services. This finding was clearly erroneous for two reasons.

First, the testimony of former Mayor DeJohn established that only two City services were to be provided to Woodhawk:

> Q: Okay. Tell the Court if you will what occurs when a property owner makes an application to develop property and represents it will be in a private drive or private roadway kind of situation?
>
> A: Well, the building requirement of the buildings have [sic] to of course, be met. We go through a review of the plans of the roadways, parking areas. We scrutinize and have both fire department and police department review these plans to be sure that fire equipment can be executed and because of the size of the fire vehicles. *Those are the two services that we do give to private developments or multifamily developments.*

Transcript of DeJohn testimony, Joint Apdx. p. 237-238 (emphasis added). It is clear that if fire and police service are the only two City functions provided to Woodhawk, then all other services, including garbage collection, are not provided.

Second, Woodhawk residents knew and accepted from the outset that they would bear charges for snow removal, street repair, and garbage removal. The costs for these items are all classified as "common area expenses" in the Disclosure Statement, which is given to every prospective owner. These expenses are also detailed in the Declaration of

Condominium Ownership, which appears in the chain of title of every unit in the county recorder's office.

Acceptance of these items was part of the bargain that every unit owner struck with the developer. Indeed, all parties from the beginning knew that the absence of City maintenance services to Woodhawk meant that Woodhawk would not receive City garbage collection. Zaremba would not have taken the time and effort to include estimates of garbage collection costs in the required disclosures he filed unless he understood that the City would not collect garbage from Woodhawk. Moreover, the lack of City garbage collection to the development prompted the Woodhawk Owners Association to enter into a contract with a garbage hauler. Likewise, the individual residents would not pay a private hauler to collect their garbage if they expected the City to provide the garbage collection service.

Everyone with a stake in the Woodhawk development understood from the outset that the lack of City maintenance services implied the lack of garbage collection services. To the extent the language of the agreement was ambiguous, the interpretation placed on it over the years by Zaremba, the unit owners, and the City demonstrates that garbage collection was not included. Consequently, the district court clearly erred in holding that City maintenance services did not include garbage removal.

By establishing a *quid pro quo* with Zaremba, the City, avoided the extra expense of collecting garbage from a large development. Through these negotiations, the City was able to pursue its goal of cost containment in the provision of

garbage collection services. Therefore, there is a rational basis for the City to deny garbage collection to Woodhawk.

II. INDIVIDUAL UNIT OWNERS IN WOODHAWK WERE ON NOTICE THAT GARBAGE SERVICES WOULD NOT BE PROVIDED.

A basic element necessary to the transfer of real property is a state's Recording Act. Ohio's Recording Act provides, in pertinent part:

> 5301.25 RECORDING OF INSTRUMENTS FOR CONVEYANCE OR ENCUMBRANCE OF LANDS; NAME OF SURVEYOR
>
> (A) All deeds, . . . and instruments of writing properly executed for the conveyance or encumbrance of lands, . . . shall be recorded in the office of the county recorder of the county in which the premises are situated. . . .

OHIO REV. CODE ANN. § 5301.25 (Baldwin 1999).

The deeds for the Woodhawk units sold to individual purchasers were recorded pursuant to § 5301.25.

Ohio adds another recording requirement when the real property in question is a condominium development. The developer of a condominium must file a declaration as provided in Ohio Revised Code § 5311.06:

> 5311.06 RECORDING OF DECLARATION

> (A) A declaration of condominium property shall be filed and recorded in the office of the recorder of the county or counties in which the land or water slips described in the declaration are situated.
>
> *****
>
> C) No interest in a unit shall be conveyed until the declaration, bylaws, and drawings, certified as provided in this section, have been filed for record. Errors or omissions in the declarations, bylaws, or drawings do not affect the title of a grantee of a unit.

OHIO REV. CODE ANN. § 5311.06 (Baldwin 1999).

Zaremba filed a proper declaration of condominium ownership within which the estimated charges for garbage collection appeared. The Declaration of Condominium Ownership and By-Laws for Woodhawk Club is recorded at Volume 15622, Page 6, et seq. of the Cuyahoga County Deed Records. The Declaration of Condominium Ownership and By-Laws for Woodhawk II is recorded at Volume 93721, page 5, et seq., of the Cuyahoga County Deed Records.

If deeds and other instruments are properly recorded, then:

> Ohio has long abided by the principle that a purchaser of real property is charged with constructive notice of all prior conveyances [and encumbrances] recorded in

> his chain of title. Constructive notice is imputed notice which exists by reason of the proper filing of a conveying instrument. A purchaser of real property is obligated to exercise due diligence and thoroughly examine the chain of title to discover the existence of adverse claims or encumbrances.

Columbia Gas Transmission Corp. v. Bennett, 594 N.E.2d 1, 5-6 (Ohio Ct. App. 1990) (citations omitted).

All purchasers of units in Woodhawk were under an obligation to conduct or have conducted an examination of the chain of title of the unit that they were purchasing. Such an examination would have revealed the recorded Declaration of Condominium Ownership and the requirement for payment for garbage collection contained therein. Thus, those owners cannot now say that they are not bound by the agreement Zaremba made with the City, when they knew of the requirement to pay for private garbage collection before they entered into a purchase agreement for their condominium.

In addition, the residents benefitted from the arrangement. A waiver of setback requirements allowed Zaremba to build the condominium buildings closer together--which allowed for more units in the same amount of space. This increased density benefitted every owner, beginning with Zaremba. He could build more units to sell. Prospective individual unit owners were rewarded with a lower per unit cost for common expenses. This meant that any individual unit was more affordable. Current unit owners also profit from reduced common area expense because these lower costs make Woodhawk condominiums more attractive on the resale

market. These facts provide a further rational basis for the City's position herein.

CONCLUSION

The City of Mayfield Heights has a legitimate government interest in controlling municipal expenditures for garbage collection. A rational basis for controlling those costs was accomplished by the City's promise to waive building setback requirements for Woodhawk as long as Woodhawk agreed to be a private, gated community with no need for City services. Therefore, the City has not violated the Equal Protection Clause. Consequently, the decision of the district court is REVERSED with directions to enter judgment for defendants and to dismiss the complaint with prejudice.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

[Filed August 26, 1998]

No. 1:97-CV-1759

THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOCIATION, et al.,
Plaintiffs,

v.

CITY OF MAYFIELD HEIGHTS, et al.,
Defendants.

JUDGMENT

On the basis of the Complaint, Answer of the Defendants, Stipulations of Fact, Trial Briefs submitted, exhibits, and the evidence taken at the trial held on August 11, 1998, the Court finds as follows:

1. The Court has jurisdiction over this matter under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

2. Venue is properly in the Northern District of Ohio, Eastern Division pursuant to 28 U.S.C. § 1391, *et seq.*

3. Plaintiffs, Woodhawk and Woodhawk II are not-for-profit corporations organized and existing under the laws of the State of Ohio.

4. Woodhawk provides a corporate entity for two hundred thirty-six (236) condominium owners.

5. Woodhawk II provides a corporate entity for seventy-two (72) condominium unit owners.

6. Woodhawk and Woodhawk II are authorized under Ohio Rev. Code § 5311.20 to bring actions for and on behalf of such condominium unit owners.

7. Woodhawk and Woodhawk II are located in the City of Mayfield Heights, County of Cuyahoga, and State of Ohio.

8. Defendant, the City of Mayfield Heights, is a municipal corporation and political subdivision organized and existing under the laws of the State of Ohio.

9. Defendant, Margaret Egensperger, is the duly elected Mayor of the City of Mayfield Heights and controls and supervises all departments and divisions of the City's administration.

10. Defendant, Andrew Fornaro is the Service Director for the City of Mayfield Heights with responsibility

for directing the collection and disposal of refuse within the limits of the City.

11. Woodhawk Club and Woodhawk II are condominiums developed within the City of Mayfield Heights and organized sometime in the early 1980's.

12. The Declaration of Condominium Ownership and By-Laws for Woodhawk Club is recorded at Volume 15622, Page 6, et seq. of the Cuyahoga County Deed Records.

13. The Declaration of Condominium Ownership and By-Laws for Woodhawk II is recorded at Volume 93721, page 5, et seq. of the Cuyahoga County Deed Records.

14. The Court finds that at the time the developer proposed the development, the developer requested that certain land be rezoned from R-1 to U-3, which would support a condominium development.

15. The Court finds in making this application, detailed plans and other submissions were made to the City. These plans were revised over numerous times and discussed with the City and City representatives, including the police department, city engineers, fire department.

16. The Court funds these submissions were accepted by the City and that the development was thereafter approved by the City.

17. On March 3, 1980, the City Planning and Zoning Commission accepted the submission by the

developer. At that time, it was represented that the development would be private and would need no maintenance services from the City. The Court finds no specific reference in the Planning and Zoning Commission minutes that there was any discussion or representation that refuse service would be provided or requested.

18. The Court finds no other credible testimony that this was a topic of discussion between the parties at that time. As indicated, upon the receipt of the approval of the City construction began on the Woodhawk development.

19. The condominium documents as recorded in the Cuyahoga County records indicated that members of the condominium associations would bear the cost of refuse service.

20. The City adopted an administrative decision, under the direction of the Mayor and Service Director, that provides the tax-supported service of collection and disposal of refuse from all single and double family residences would be supported by tax funded receipts or it would be supported by public tax monies. The City under the direction of the Mayor and Service Director has failed and refused to provide the collection and disposal of rubbish from condominium residences that do not directly abut publicly dedicated roadways within the City.

21. Real property owners in the City of Mayfield Heights, including Woodhawk and Woodhawk II's residents, pay to the City real property taxes and income taxes. The City earmarks a percentage of those taxes for the general fund, from which the cost of refuse collection is paid.

22. The City currently and for approximately eight years has contracts with a private hauler to perform rubbish collection services.

23. Under this scheme, Woodhawk and Woodhawk II have been obligated to contract with private rubbish collection services to perform rubbish collection within the condominium developments. From at least 1989, the Plaintiffs in this case have made requests to the City to provide rubbish collection services. The City refused.

24. Woodhawk and Woodhawk II share an entrance that is gated and contains a guardhouse with a guard on duty 24 hours per day. The gated entry does not restrict access to police, fire and rubbish trucks. Police, fire and rubbish trucks are generally not impeded, except when the guard who is at the gatehouse may be absent. The Court finds that these are relatively small periods of time.

CONCLUSIONS OF LAW

1. Article I, Section 2 of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States of America require that laws be equally provided or equally applied against citizens. Limitations placed upon governmental action by the equal protection clauses of the Ohio and United States Constitutions are essentially identical. The demands that equal protection be afforded our citizens does not require that all laws apply universally to all persons.

2. The legislature, if it acts at all, may impose special burdens upon or grant special benefits to special

groups or classes of individuals. The essence of the equal protection doctrine is that both the United States and Ohio Constitutions do not require that things different in fact be treated in law as though they were the same, but it does require that in the concern for equality, those who are similarly treated or similarly situated be similarly treated.

3. Equal protection of the laws is not only a pledge that the laws be equally applied. It is also a pledge that classifications contained within governmental action be directed towards matters which are a legitimate concern of the government and be based upon distinctions which are objectively reasonable.

4. The Court finds in this case that there is no compelling governmental interest involved and that there is no suspect classification involved. Having made those findings, the Court finds that the City's policy is subject to rational basis scrutiny. Under that scrutiny, the governmental classification must bear some rational relationship to a legitimate governmental objective.

5. In reviewing the determinations made by the City, the Court is deferential. The Court is required under that finding to defer to the governmental determinations made by the City if those classifications are rationally based.

6. In this case, the Court finds the City made a distinction among certain citizens in the City. It has set up classifications different for those single family property owners who live in a condominium which do not front on a public road, and it separates that classification from those who

live in non-condominiums or live in homes or residences that do front upon public roads.

7. In making this determination, the City made several arguments. First, the City has suggested that the Plaintiffs in this case are third party beneficiaries and therefore bound by determinations or representations made by the developer of this property. The Court finds those arguments unpersuasive.

8. A third party beneficiary is one for whose benefit a promise is made but who is not a party to the contract. An intended beneficiary is one who has enforceable rights under the contract in contrast to incidental beneficiary who has no rights of enforcement.

9. The distinction between an intended and an incidental beneficiary is that the contract must be entered into with the intent to benefit the one who is the intended beneficiary. There must be an intent to benefit.

10. In making a decision on this, the Court first looks to who the parties are in that contract. In that case, the contract flows through the developer to the condominium owners. The Court finds nothing in the governing documents of the condominiums to suggest that the City is either an intended beneficiary of the purported contract between the developer and the condominium association or its members.

11. The Court finds the language contained with the Declaration of Woodhawk is insufficient to create an obligation of the individual members. Rather it is a disclosure

of potential expenses that the members may bear as opposed to an obligation on behalf of the members.

12. The Court finds the minutes of the planning and zoning commission support the Court's analysis. The minutes of the Planning and Zoning Commission meeting of March 3, 1980, at which it was indicated that the City would have no maintenance expense, specifically influence the Court. The Court finds unpersuasive the City's argument that this means the City would have no responsibility for the garbage collection obligations which the Court finds distinguishable from maintenance obligations.

13. Therefore, the Court finds no contractual agreement between the condominium members or the association and the City that would obligate the condominium owners to pay these refuse costs. The Court must now determine whether or not the actions of the City violate the equal protection rights of the Plaintiffs.

14. The Court is obligated to make a determination as to whether the City's classification bears a rational basis to a legitimate governmental basis.

15. After receiving the evidence and observing the demeanor of the witnesses, the Court finds the Plaintiffs have shown that the City does not make a legitimate distinction based upon safety concerns.

16. There are few children in this development. There is little traffic in this development and nearly no accidents in this development. The development is open to

pedestrian traffic, open to police, and open to rubbish services.

17. While the development can control the use of the roads, the development is otherwise generally open to the public. There has been no damage to garbage trucks, and no accidents involving garbage trucks despite the fact that the garbage trucks currently used by Plaintiffs' refuse service are larger than those used by the City.

18. The Court finds that the evidence taken as a whole proves there is no legitimate grounds for the distinction between condominium owners contained in the Woodhawk and Woodhawk II developments.

19. Having made that determination, the Court finds the City's policy violates Plaintiffs' rights to equal protection of the law guaranteed by the Ohio and U.S. Constitutions.

20. In considering suitable remedies, the Court finds persuasive the Defendants' suggestion that Plaintiffs delayed bringing this action after some notice that certain rights were being violated. For this reason, in equity, the City should pay Plaintiffs sums flowing from those garbage removal costs from the filing of this action which the Court calculates to be $26,000.00.

21. Defendant City shall further provide refuse pickup services to Plaintiffs in a reasonable period of time not to exceed three months.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT Defendant City's policy of refuse collection and disposal is hereby declared unconstitutional and null and void to the extent it denies Plaintiffs equal protection under the law;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendant City, its Mayor, Service Director, members of Council, other officials, agents or employees, and their successors, with the responsibility to enforce such policy, be restrained and enjoined from further failing, refusing or neglecting to pick up and collect Plaintiffs' refuse;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendant City shall commence the collection of the Plaintiffs' garbage in a reasonable period of time, but not to exceed three months from the date of the entry of this order;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Defendant City be ordered to pay Plaintiffs the amount $26,000.00 for damages sustained by Plaintiffs as a result of Defendants' unconstitutional actions; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Plaintiffs be awarded their costs in the prosecution of this action.

IT IS SO ORDERED.

/s/_____
Judge James S. Gwin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 24, 2000]

No. 98-4163

THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOCIATION, ET AL., *Plaintiffs-Appellees,*	)
v.	)
CITY OF MAYFIELD HEIGHTS, ET AL., *Defendants-Appellants.*	)

ORDER

BEFORE: NELSON and DAUGHTREY, Circuit Judges; and BERTELSMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

Supreme Court, U.S.
FILED
AUG 31 2000
CLERK

No. 99-2037

IN THE
Supreme Court of the United States

THE WOODHAWK CLUB CONDOMINIUM OWNERS ASSOCIATION, *et al.*,

Petitioners,

v.

THE CITY OF MAYFIELD HEIGHTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Petitioners

The Petitioners, Woodhawk Club Condominium I Owners Association and Woodhawk Club Condominium II Owners Association (hereinafter collectively referred to as "Woodhawk"), are not-for-profit corporations organized and existing under the laws of the State of Ohio. Woodhawk I provides a corporate entity for 236 condominium unit owners. Woodhawk II provides a corporate entity for 72 condominium unit owners. Woodhawk is located in the City of Mayfield Heights, County of Cuyahoga and State of Ohio. The Declaration of Condominium Ownership and Bylaws for Woodhawk I and II are recorded at Volume 15622, Page 65 *et. seq.* and Volume 93721, Page 5 *et seq.*, respectively, of the Cuyahoga County Deed Records.

Respondents

Respondent, the City of Mayfield Heights (hereinafter referred to as "the City") is a Municipal Corporation organized and existing under the laws of the State of Ohio. The City is a suburb of Cleveland with approximately 20,000 residents. The City's housing stock comprises 5,000 single family residences and 5,000 two-family ("duplex") residences. The remaining 5,000 residences are made up of multi-family condominiums and/or apartments.

Respondent, Mayor Margaret A. Egensperger, is the duly elected Mayor and Safety Director of the City, who controls and supervises all departments and divisions of the City's administration. Respondent, Andrew Fornaro, is the Service Director for the City who, before the privatization of refuse collection and removal, was responsible for directing the collection and disposal of refuse for the City.

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RESTATEMENT OF THE CASE

Unfortunately, Woodhawk's "Statement of the Case" is nothing more than counsel's invective, unsupported assumptions, misinterpretation and misstatement of the facts.

On July 1, 1997, Woodhawk filed a Complaint for Declaratory Judgment and Permanent Injunction in the United States District Court for the Northern District of Ohio, Eastern Division. The Complaint alleged federal and state claims based upon allegations of Equal Protection violations. The City filed its Answer to the Complaint on July 25, 1997.

After extensive discovery was completed, a trial on the merits was held on August 11, 1998. The District Court held in favor of Woodhawk on all claims. In an Order and Judgment dated August 26, 1997, the District Court held that the City's policy of refuse collection and disposal was unconstitutional and declared same null and void. Further, the City was restrained and enjoined from further failing, refusing, or neglecting to pick up and collect Woodhawk's refuse. The City was ordered to commence collection of Woodhawk's refuse in a reasonable time not to exceed three months from the date of entry of the Order. The City was also ordered to pay Woodhawk $26,000 for "damages" sustained.

An Appeal to the Sixth Circuit followed on September 22, 1998. Subsequent to the Briefing Schedule, Oral Argument was held on December 14, 1999. The Sixth Circuit reversed the decision of the District Court in an Unpublished Opinion dated February 3, 2000. Woodhawk's Petition for Rehearing En Banc was denied on March 24, 2000. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

Woodhawk has not articulated or demonstrated any compelling reason for granting Certiorari and its Petition should be denied. Notwithstanding Woodhawk's imaginative forecasting, the Court of Appeals' decision will not "allow municipalities to discriminate against single family homeowners who own condominiums in favor of other single family residences who do not own condominiums." The Court of Appeals' holding was proper in all respects and does not call for a review by this Court.

In reality, the Court of Appeals' decision will simply allow municipalities to make sound and reasoned distinctions and establish administrative policies which are rationally related to legitimate governmental interests, all in line with the Equal Protection Clause.

BACKGROUND

To begin with, Woodhawk completely misstates the City's Policy in order to intensify their argument. In point of fact, when accurately stated, the City's Policy and distinction are absolutely constitutional.

In the 1960's the City of Mayfield Heights (through then Mayor, Ross C. DeJohn and the city council at the time) created the present administrative/legislative policy which provides for the City's collection of refuse, snow plowing, road repair and city maintenance services for all single family and duplex (two family) residences that directly abut public dedicated roadways, but not for residences, condominiums and/or multi-family apartment buildings **that do not directly abut public dedicated roadways within the City**. The

Policy was adopted after due deliberation and consideration by the City, its administrative and legislative body. Furthermore, consistent with City's Policy of not collecting refuse from the residences located on private, non-dedicated roadways, the City does not plow or remove snow, repair or maintain the roads therein.

Woodhawk's developer, Zaremba Builders (hereinafter referred to as "Zaremba"), approached the City in approximately 1980, through its relevant committees, commissions and boards, and applied for project approval. Zaremba presented full and complete architectural plans and drawings which depicted the entire project. The City's initial consideration was the existing zoning. The existing zoning classification *did not allow for the proposed Woodhawk project.* Thus, the developer applied for and received a zoning variance from the City.

Subsequent to receiving their zoning variances, Zaremba requested the right to be exempted from the City's Building Code Standards regarding building setbacks from roadways, exclusion of sidewalks, exclusion of tree lawns, and reduction of right-of-way width requirements to accommodate the configuration and density requests. The incentive for the City's compromises was Woodhawk's absolute assurance that the City would have no service maintenance obligations on these non-dedicated streets which do not meet dedication standards. "City maintenance services" include rubbish removal, snow plowing, and roadway maintenance. The City's Planning and Zoning Commission minutes reflect that Woodhawk represented that it would be totally private and require no City maintenance services.

Woodhawk is a community with children as well as many senior citizens. Further, Woodhawk admits that the traffic flow is similar to other City roadways. To their benefit and desire, the Woodhawk development resulted in private streets, narrower in width than required for public streets or rights-of-way, few, if any, sidewalks and tree lawns to act as buffers for pedestrian and vehicular traffic, which are thrown together on these private roadways. Woodhawk's condominiums are located closer to the street than the other residences in the City. Clearly, Woodhawk's private condominium community was planned as (and in fact developed into) a totally private, electronically-gated and guarded enclave with eliminated public access. Another advantage Woodhawk enjoys is the fact that their traffic signs and parking regulations/practices do not conform to state law. Furthermore, due to the condition of their streets, parking is allowed on *both sides of the street, even where there are fire hydrants*. The City is completely powerless to keep order in this private community.

The fact that Woodhawk is a private, gated, secured enclave, where the unit owners retain the financial responsibility for rubbish removal, snow removal, and road maintenance and repair (in exchange for privacy and no public access), is not a secret or an undisclosed fact. Significantly, the prospective unit owner is advised of this fact in marketing presentations and promotional materials. This fact is also made known to prospective purchasers through the recorded filings of: (1) the Declaration of Condominium Ownership and Bylaws; (2) the deed covenants and restrictions; and (3) the disclosure statements, all of which clearly show that rubbish removal, snow removal and road repair/maintenance are all part of the unit owners' financial responsibility. Further, Woodhawk's common area

maintenance charge includes rubbish removal. Thus, Woodhawk's residents were (and are) well aware before their initial purchase what costs and expenses they would be (and are) responsible for.

At the time of the development of Woodhawk's project, the City considered and deliberated over fiscal and budgetary matters that impacted legitimate health, safety and welfare concerns, specifically, the impact on the City's fiscal and/or budgetary planning and the prospect of additional City revenues through taxes, with a minimal impact on City services by virtue of a prior agreement between the City and the developer.

One of the City's reasons to deny the rubbish removal, snow removal, and road maintenance services is that residents of Woodhawk must walk/ride bicycles in the roadways, thereby mixing all pedestrians with vehicular traffic. The City's mandate to protect the health, safety and welfare concerns of its Woodhawk residents, transcends the City's available liability insurance for bodily injury or damage to property. The City has a fundamental duty to keep its residents out of harms way, which it accomplishes by promulgating rational and reasonable building standards. The City requires roadways or public streets to be 50 feet in width. This ensures adequate road pavement width, as well as appropriate buffers between pedestrian and motor vehicle traffic by way of tree lawns and sidewalks. When a private community requests deviation from these standards (in exchange for privacy and the elimination of public access), it is undertaking both financial and certain other responsibilities for its residents. As such, the City loses its traffic enforcement jurisdiction, regarding traffic signage, parking and vehicle towing. When one considers the

roadways are narrower, there are no tree lawns, inadequate sidewalks, rubbish bags placed in or too near the roadway, and no place to push the snow off of the roadways, some or all of these factors contribute to risk of injury to persons and damage to private roadways, not otherwise occurring in public rights-of-way.

LAW AND ARGUMENT

A. The City's Policy of Refuse Collection Does Not Violate Equal Protection

As stipulated by Woodhawk, the right to free waste/public garbage collection is not a fundamental right of individuals. *Goldstein v. City of Chicago*, 504 F.2d 989, 991 (CA 7, 1974); *See also*, *Beauclerc Lakes Condominium Association v. City of Jacksonville*, 115 F.3d 934, 935 (CA 11, 1997). Further, although the collection of refuse is one of numerous governmental functions, its existence does not give rise to a vested right through its continuation or the creation of a "fundamental right," for purposes of equal protection analysis. *Rubin v. City of Wauwatosa*, 342 N.W.2d 451, 457 (1983). Consequently, when legislation or a classification is economic or social in nature and neither a fundamental right nor suspect class is involved, the level of scrutiny required under equal protection analysis is ***rational basis review***. *Borman's, Inc. v. Michigan Property & Casualty Guaranty Association*, 925 F.2d 160, 162 (CA 6, 1991) (emphasis added).

In equal protection analysis under the rational basis standard, *state action is presumed to be valid* and will be sustained if the classification drawn by the state is rationally related to a legitimate state interest. *Valot v. Southeast Local*

School District Board of Education, 107 F.3d 1220, 1229 (CA 6, 1997) (emphasis added). Further, the burden of showing that government action is not rationally related to any legitimate state purpose falls squarely on the shoulders of the entity challenging the action. *Id.*, *See also*, *Blue Diamond Coal Co. v. Secretary of Health and Human Services*, 79 F.3d 516, 521 (CA 6, 1996).

The City's Policy of refuse collection is analyzed under the rational basis standard. It has been established that an enactment which does not impair interests of members of any suspect or quasi-suspect class, and does not inordinately burden the exercise of any fundamental constitutional right, is tested under the least demanding equal protection standard, the rational relationship inquiry. *Id.* Under the deferential rational relationship evaluation, *legislation is presumed to be valid* and is sustained against equal protection attack, if the classification drawn by statute is rationally related to a legitimate state interest. *Id.*, at 293 (emphasis added).

Under the rational basis standard of review, the City's Policy of refuse collection and removal is constitutional and not in violation of the Equal Protection Clauses of the United States or the State of Ohio Constitutions.

1. The City's Refuse Policy Is Constitutional And Is Rationally Related To Legitimate Governmental Interests

Refuse collection and removal is a municipality health, safety, and welfare concern/consideration. The City's policy of refuse removal is rationally related to numerous legitimate governmental interests. The City's policy of non-pick up of refuse from residences which are not immediately abutting

a public right-of-way bears a rational relationship to the legitimate governmental interest of the preservation of the public health, safety, and welfare.

i. The City's Policy Is Rationally Related To The Legitimate Governmental Interest Of The Preservation Of The Health, Safety, And Welfare Of Its Residents

Woodhawk's community is located on private, non-dedicated roadways which were not built to the same specifications of public dedicated roads and rights-of-way, specifically with regard to roadway pavement, sidewalk width, right-of-way width, and tree lawns included as buffers. These factors contribute to the City's health, safety, and welfare concerns.

Woodhawk is a community with children as well as many senior citizens. Significantly, Woodhawk admits that not all of its streets have sidewalks. Notwithstanding the existence of children, adult, and senior citizen pedestrians, Woodhawk's traffic flow is similar to other City roadways. Thus, one of the City's reasons to deny the rubbish removal, snow removal, and road maintenance/repair services is that these residents of Woodhawk must walk/ride bicycles in the roadways, mixing all pedestrians, walkers, joggers, and bicycle traffic with vehicular traffic. The City maintenance vehicles would be travelling dangerously close to these pedestrians who are forced to walk, jog, run, or ride bicycles on the street. The City has a fundamental duty to keep its residents safe. The City has accomplished this by promulgating rational and reasonable building standards, standards from which Woodhawk has deviated, thereby endangering City residents.

The City's Codified Ordinances, which require roadways or public streets to be 50 feet in width, insures adequate road pavement width, as well as appropriate buffers between pedestrian and motor vehicle traffic by way of tree lawns and sidewalks. Further, although vehicles do park on the roads, a violation of the Condominium regulations, Woodhawk "does not concern itself with it." Thus, the City has a legitimate concern for the health, safety, and welfare of its residents. Moreover, the City's mandate to legislate for and protect the health, safety and welfare concerns of its Woodhawk residents, transcends the City's available liability insurance for bodily injury or damage to property.

To add to the City's concern for the health, safety, and welfare of its residents who live in Woodhawk is the fact that the City cannot enforce any traffic, parking, or towing issues, thereby placing all child, adult, and senior citizen pedestrians in grave danger with vehicular traffic. As a private development with public access eliminated, Woodhawk enjoys the advantage that their traffic signs and parking regulations/practices do not have to conform to state law. Furthermore, even with the condition of their streets, Woodhawk permits parking on *both sides of the street, even where there are fire hydrants*. The City is completely powerless to keep vehicular order in this private community.

The City does not pick up refuse on private, non-dedicated drives due to health, safety, and welfare concerns, its inability to enforce the law on these streets, and the sporadic inability of the Police Department to enter the private community. In a case almost directly on point, it was held that municipalities' ordinances which limit refuse collection service to curbside collection along public streets is constitutional as being rationally related to the legitimate

governmental interests of **ensuring safety along complexes' privately owned streets** and of reducing and controlling the cost of solid waste disposal. *Property Owners and Managers Ass'n v. Mayor and Town Council of Parsippany-Troy Hills*, 624 A.2d 1381, 1385 (1993) (emphasis added). Further, the classification between private streets and public streets results from real, and not feigned, problems inherent in collecting garbage from locations within landowner's premises, as contrasted with collections from the curbside of public streets. *Id.* Most importantly, these inherent problems with private premises include *the difficulties associated with entries onto the private property to be serviced*. *Id.* (emphasis added).

When one considers the narrower roadways, the lack of tree lawns and sidewalks as buffers between pedestrian and motor vehicle traffic, the tremendous amounts of refuse placed in or too near the roadway, and nowhere to push snow off of the roadways, it is clear that these factors contribute to damage to private roadways and an increased risk of injury to pedestrians, not otherwise occurring in public rights-of-way. The width of the right-of-way, parking requirements, distance of sidewalks from the pavement, and the presence of sidewalks and tree lawns are all health, safety and welfare factors for the City to consider.

While the City does not intend to abrogate its responsibility for safeguarding the health, safety, and welfare of Woodhawk residents, as a result of Woodhawk's choice to cloak itself in its private enclave, pursuant to the specifications demanded for its building development, the safety of its residents is now best left to Woodhawk in coordinating these maintenance services with a viable program for its residents' safety.

ii. The City's Policy Is Rationally Related To The Legitimate Goal Of Establishing A Municipal Policy Of *Efficient Sanitation*

In the 1960's the mayor and city council, in their mandate to address health, safety, welfare, and fiscal concerns, faced the issue of refuse hauling with respect to residences, multi-family buildings, apartments, and condominiums which are located on private non-dedicated roadways. After these considerations and deliberations, the City adopted *the Policy of not providing refuse removal, snow plowing, or repair of roads for any residences, multi-family condominium or apartment projects located on private, non-dedicated roadways in the City*. This Policy clearly advances the City's interest in achieving efficient sanitation, as it relates to finance, health, safety, and welfare.

The Eleventh Circuit has held an identical classification constitutional, stating that:

> The City's provision of free waste collection service only to residential premises consisting of four or fewer units was rationally related to achieving the *legitimate goal of efficient sanitation* and, thus, did not violate the equal protection rights of the condominium owners who were denied free refuse service. The City could have assumed that condominium associations were better positioned to negotiate with private sanitation services. *Beauclerc Lakes Condominium Association*, at 934-935. (emphasis added); and
>
> That the City *may have* sought to achieve the legitimate state interest in sanitation by providing,

> at no cost, waste collection service to individuals or small groups of individuals less likely to have sufficient bargaining power to obtain such services at a reasonable price satisfies rational basis scrutiny and, therefore, constitutes no violation of the Equal Protection Clause. *Id.*, at 936 (emphasis added).

Furthermore, the Seventh Circuit as well as the Wisconsin Court of Appeals have agreed with the Eleventh Circuit's holding that **efficient sanitation is a legitimate governmental interest**. Where municipalities have distinguished between single family homes and multiple unit buildings and where Cities refuse to provide rubbish collection for condominiums and multiple unit buildings, Courts upheld this distinction, finding that *it did not violate the Equal Protection Clause* on the theory that:

> The reason for the distinction is that owner(s) of large residential buildings with a greater amount of garbage have more effective bargaining power with private scavenger services than the owner of a single unit. The city's distinction between types of residential structures in providing *efficient sanitation is, in our judgment, reasonable. Goldstein*, at 992; See also *Carpenter v. Commissioner of Public Works of the City of Racine, Wisconsin*, 339 N.W.2d 608, 611 (1983) (emphasis added).

Efficient sanitation is a legitimate goal. *Beauclerc Lakes*, at 935. In this case, the City's legislative body could believe that Woodhawk, benefitting from its larger scale, generally enjoys greater bargaining power with private waste removal

services. *See Beauclerc Lakes*, at 935. In fact, this is true. The City spends approximately **$625,000** per year on refuse removal. Significantly, the monthly cost per household for refuse removal in the City is approximately **$10.25**. However, Woodhawk I and Woodhawk II residents pay **$6.70** and **$1.13** per month, respectively, for refuse removal. This Policy advances efficient sanitation practices within the City.

A government is not required to provide sanitation service to all or none. *Id.* Clearly, the City's Policy advances efficient sanitation. Woodhawk residents do not pay nearly as much as the City residents per month for refuse removal. This fact, on its own, provides a rational basis for the City's refuse Policy.

iii. The City's Policy Is Rationally Related To The Legitimate Governmental Interest Of Maintaining *Fiscal Costs* And Controlling A Municipality's Waste Disposal And Sanitation Expenditures

Not only is the City's Policy rationally related to the above health, safety, welfare, and efficiency ends, it is also related to the legitimate economic and fiscal cost concerns of the City. Based on the past representations, assurances, and promises of developers, the City has rationally budgeted and considered all of its revenues and expenses. Including the refuse pick-up of approximately 308 additional units from the Woodhawk development alone, *along with the all other apartments and condominiums in the City*, would cause an exorbitant increase in the cost and efficiency of refuse collection and removal to the City. In the face of the City's mandate for fiscal concerns, forcing the City to literally double its trash hauling budget would have a severe impact on all of the City's residents.

Fiscal and budgetary considerations of a municipality are health, safety, and welfare concerns. At the time of the development of Woodhawk, the City considered and deliberated over fiscal and budgetary matters that specifically impacted legitimate health, safety and welfare concerns. Specifically, the City considered the impact on its fiscal and budgetary planning and the prospect of additional revenues through taxes, with a minimal impact on City maintenance services by virtue of a prior agreement with Zaremba, and the extent to which the City's fiscal and budgetary consideration would be impacted (either positively or negatively) by the decision to allow the project to proceed or not.

A statement made by the District Court Judge during the trial of this matter demonstrates that the City's Policy addresses, controls and affects fiscal costs. During the Direct Examination of the City's expert, the Judge stated:

> **Other than saving the City money**, what rational basis does it have to deny some homeowners the refuse services while affording it to others?

Thus, the Trial Judge was aware that the Policy, indeed, saves the City money. Fiscal costs and administrative constraints **alone** may furnish a legitimate basis for a municipal decision. *399 Lincoln Associates v. City of Orange Township*, 581 A.2d 1364, 1366 (1990) (emphasis added). With respect to the City's considerations regarding Woodhawk and the refuse issue, the City, in addressing rational and reasonable health, safety and welfare concerns, fiscal plans, and budget concerns, made fiscal decisions based on a policy that was uniformly accepted and later

memorialized in legislation. Furthermore, administrative convenience is generally acceptable as a rational basis for municipal classification, at least where the interest affected by the classification is neither fundamental or suspect. *Id.*, at 1367; *See also*, *Property Owners*, at 546.

The City has budgeted approximately $625,000 per year on refuse removal. To mandate that the City now double this expenditure would be an economic tragedy for the citizens of the City of Mayfield Heights and in direct contravention of the legitimate governmental interest of controlling and maintaining fiscal costs.

iv. Woodhawk Is Not Similarly Situated With Any Individual Or Entity Who Is Treated In A Dissimilar Manner

Under the rational basis test, Woodhawk may succeed only if it can demonstrate that the City intentionally treated it differently than others similarly situated. *Thornton v. City of Allegan*, 863 F. Supp. 504, 508 (W.D. Mich. 1993). Moreover, even if Woodhawk is able to establish such a prima facie case, its claim will be defeated if there is a rational relationship between the dissimilar treatment and a legitimate governmental purpose. *Id.*

Woodhawk cannot establish a prima facie case. Woodhawk has not (and cannot) establish any intentional discrimination. Further, the City was acting in compliance with a court order validating the Policy as constitutional. (*See Sturbridge Village Condominiums Association, Inc. v. City of Mayfield Heights, et al.* (Ct. App. Cuy. Cty., Nov. 15, 1979, unreported No. 39667)). Thus, Woodhawk has failed to establish intentional discrimination.

Woodhawk cannot establish that it is similarly situated with individuals or entities who are receiving preferential or dissimilar treatment. The City does not provide refuse removal to any other residence located on private, non-dedicated roadways. Moreover, the City does not collect refuse from any residents whose properties can only be reached by driving on privately owned drives. Woodhawk has no evidence or facts that the City provides refuse collection for any properties located on private, non-dedicated streets.

Clearly, **Woodhawk is dissimilar** to dedicated streets in that it does not conform to requirements of: width of the right-of-way, parking, the distance of sidewalks from the pavement, and the presence of sidewalks and tree lawns. Public dedicated streets must conform to the letter of the City code. Woodhawk is dissimilar due to their status as a private, gated community which prohibits access to the general public.

Significantly, the City does not pick up refuse or provide any other City maintenance service for any residences, condominium or apartment projects that are located on private, non-dedicated roadways in the City. Thus, Woodhawk cannot establish that they are being treated differently than similarly situated individuals. All of those similarly situated with Woodhawk are treated alike.

B. The Court of Appeals May, Indeed, Hypothesize and Conceptualize Facts to Support Equal Protection Rational Basis Scrutiny of the City's Policy

Not only was the Court of Appeals correct in reversing the District Court due to the legitimate governmental interests

furthered by the City's refuse policy, the Court of Appeals correctly held that the District Court erred in failing to conceive of a rational basis.

With rational basis review, a classification comes to a Court bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negate every ***conceivable*** basis which ***might*** support it. *Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988) (emphasis added). Further, because a Court *never* requires a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *Flemming v. Nestor*, 363 U.S. 603, 612 (1960) (emphasis added). Thus, the City's policy must be presumed constitutional and every conceivable basis to support same must be negated. In this case, the District Court failed to: (1) Cloak the City's policy with the presumption of constitutionality; and (2) Negate any conceivable basis. The decision of the Court of Appeals is in line with all applicable Supreme Court precedent and must be affirmed.

With respect to rational basis scrutiny, this Court has clearly (and recently) stated that:

> In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any* **reasonably** *conceivable* **state of facts that** *could* **provide a rational basis** for the classification. *Federal Communications Commission and United States v. Beach*

Communications, et al., 508 U.S. 307, 313 (1995) (emphasis added). See also, *Dandridge v. Williams*, 397 U.S. 471, 484 (1970).

Further, where there are "*plausible* reasons" for [legislative] action, [a Court's] inquiry is at an end. *Federal Communication Commission*, at 313-314. (emphasis added, quotations in original); *See also, United States Railroad Retirement Board. v. Fritz*, 449 U.S. 166, 174 (1980). **This standard of review is the paradigm of judicial** *restraint. Federal Communications Commission*, at 314. (emphasis added). Thus, when social or economic legislation is at issue, the Equal Protection Clause allows the state wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by democratic process. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-296 (CA 6, 1997).

With the number and type of pedestrian traffic mixed together with vehicular traffic on Woodhawk's narrow streets and the lack of parking regulations, the District Court should have conceived that a rational basis exists for the City's Policy as it relates to ***health, safety and welfare concerns.*** Further, with the present state of the City's budget and expenditures, as well as the tremendous disparity between City residents monthly cost with Woodhawk resident's monthly cost and the potential liability for personal injury exposure, the District Court should have conceived of a rational basis for the City's Policy as it relates to ***fiscal concerns*** of the City as well as ***efficient sanitation*** practices and administrative convenience.

Under rational basis scrutiny, a Court must go so far as, on its own, to conceive of a potential rational basis in order to uphold the classification. Under this test, a statutory

discrimination will not be set aside *if any state of facts reasonably may be conceived to justify it. Borman's*, at 162, (*See also*, *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (emphasis added)) The proper inquiry is whether a **conceivably** rational basis exists, not whether that basis was *actually considered* by the legislative body. *Haves v. City of Miami*, 52 F.3d 918, 921 (CA 11, 1995) (emphasis added) The actual motivations of the legislators are unimportant, and they are not required to articulate a reason for their acts. *Id.*, at 921.

The District Court failed to provide the City's policy with the presumption of constitutionality and then failed to conceive of any rational basis such as accidents, personal injuries, vehicle collisions, property damage, parking problems, efficient sanitation, or fiscal concerns. In fact, the District Court made no mention of these requirements in the Opinion. It is essential under rational basis scrutiny that the municipal policy be presumed constitutional and the Court go so far as to conceive of a set of facts which will uphold the policy. In this case, the District Court failed to follow the proper rational basis test. The Sixth Circuit's ruling in no way jeopardizes or conflicts with this Court's holdings in *Zobel v. Williams*, 457 U.S. 55 (1982) or *Hooper v. Bernalillo County*, 472 U.S. 612 (1985); the purported conflict does not exist, and review by this Honorable Court is unnecessary.

C. The Court of Appeal's Decision Does Not Require That The Respondents Provide Only Fire and Police Services Nor Does the Decision Deny to Condominium Homeowners All Other Municipal Services Such as Those Provided By the Health Department, Building Department and Department on Aging.

Woodhawk's argument that the City:

> "May now deny all municipal, tax supported services to condominium homeowners at Woodhawk, except police and fire"

is nothing more than unsupported conjecture with absolutely no support from the record or case authority. Woodhawk is simply attempting to instill panic and concern in this Court where there is (and should be) none.

Woodhawk's argument disregards a number of issues. First, in this specific case, Woodhawk has waived any City maintenance services, including refuse removal, snow removal or road maintenance. This is evident from the testimony, findings of fact and recorded documents evidencing same. Specifically, in this case, Woodhawk agreed that they would not need refuse service. In cases where distinctions are made based on non-suspect classifications, a municipal policy will be constitutional if is passes ***rational basis scrutiny***. Thus, Woodhawk's statement that "If discriminatory practice is legitimized by historical usage, then there could be no prohibition of discrimination" is absurd. The City's policy was held to be valid based on the testimony, evidence and findings of fact.

The fact that Woodhawk cites and relies on no case law with respect to this argument mandates that same be summarily disregarded and the Petition be denied.

D. The Court of Appeals' Decision Is Not Contrary to Accepted Standards of Appellate Review Nor Does It Usurp the Accepted Maxims of Appellate Court Power To Overturn and Modify the Findings of Fact Made by a District Judge.

A Court of Appeals has the absolute authority to reverse and correct a factual finding of the District Court if found to be clearly erroneous. In this case, the Court of Appeals made very detailed determinations that the District Court was incorrect and, properly, reversed the decision of the District Court Judge.

A District Court's finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Company*, 333 U.S. 364, 295 (1948). Thus, the Court of Appeals need only to have been left with a "definite and firm conviction that a mistake has been committed" in reversing a finding of fact of a District Court. *See Bannum v. City of Louisville*, 958 F.2d 1354, 1359 (1992).

In this case, the Court of Appeals correctly found and specifically detailed that the District Court was clearly erroneous ("for two reasons") in finding that Woodhawk waived and represented that they would not need city refuse collection services. First, the District Court made the factual finding that "The Declarations of Condominium Ownership

and By-Laws for Woodhawk Club and Woodhawk II are recorded in the Cuyahoga County Recorder's Office." Also, the District Court made the findings that "The condominium documents as recorded in the Cuyahoga County Records indicate that members of the condominium associations *would bear the cost of refuse service*" and there was no discussion or representation that refuse service was requested by Woodhawk. Notwithstanding these findings, the Court incorrectly held and determined that the agreement between the City and the developer did not include refuse pick-up. The Court of Appeals based this on the testimony of the former Mayor of the City (which was not considered by the District Court) and the aforementioned findings of fact (which were incorrectly disregarded by the District Court). Thus, taking all of these facts into account, the Court of Appeals held that the District Court's finding of fact was clearly erroneous.

Woodhawk opines that the Court of Appeals' decision:

> Ignores the "other testimony and evidence", and substituted its preferred decision for the District Court's Finding of Fact.

However, Woodhawk never enlightens the Court as to exactly what this "other testimony and evidence" is. The answer is simple, there is no "other testimony or evidence." The Court of Appeals made the correct decision given all of the facts and evidence.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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